In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 333

IVAN MEVICA, PETITIONER

v.

P. A. ESPERDY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B, 15–18) is reported at 317 F. 2d 220.

JURISDICTION

The judgment of the Court of Appeals was entered May 14, 1963. The petition for a writ of certiorari was filed August 8, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an alien crewman "has had his residence in the United States continuously" since his entry so as

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to qualify him for discretionary relief under § 249 of the Immigration and Nationality Act if, after his entry, he was deported and spent the following two-and-a-half months aboard the ship used to effect his deportation.

STATUTE INVOLVED

Section 249 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1259, provides:

> SEC. 249. A record of lawful admission for permanent residence may, in the discretion of of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, as of the date of the approval of his application or, if entry occurred prior to July 1, 1924, as of the date of such entry, if no such record is otherwise available and such alien shall satisfy the Attorney General that he is not inadmissible under section 212(a) insofar as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens, and he establishes that he—
>
> (a) entered the United States prior to June 28, 1940;
>
> (b) has had his residence in the United States continuously since such entry;
>
> (c) is a person of good moral character; and
>
> (d) is not ineligible to citizenship.

STATEMENT

The facts are simple and undisputed. Petitioner entered the United States as a nonimmigrant crewman January 21, 1940, and thereafter overstayed his

temporary permit (App. 2a).[1] His deportation was ordered September 4, 1942, the deportation order directing that he be granted a waiver of inadmissibility under the Ninth Proviso to Section 3 of the Immigration Act of 1917 if he thereafter sought entry into the United States as a crewman (App. 2a–3a). Petitioner "effected his own deportation" by leaving the United States on October 6, 1942, as a crewman on a Yugoslav vessel. He was granted temporary entry as a crewman, under the waiver recorded in the deportation order, when the vessel returned to the United States on December 19, 1942 (App. 3a). He again overstayed his temporary permit and has remained in the United States unlawfully since then. Another deportation order was entered against petitioner in 1952, but he has been permitted to remain here on an administrative stay (Pet. 16).

On January 6, 1960, petitioner filed an application for permanent residence status, seeking registry under Section 249 of the Immigration and Nationality Act (App. 3a). The application was based upon the assertion that petitioner had resided in the United States continuously since his temporary entry as a seaman on January 21, 1940. The district director denied the application, finding that the continuity of petitioner's residence had been broken by his deportation from the United States in 1942, and this decision was affirmed by the regional commissioner on administrative appeal (App. 3a–4a).

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[1] App. references are to the Appendix to petitioner's brief in the court below. Pet. references are to the petition for certiorari.

Petitioner then brought proceedings for judicial review, contending that the administrative officers had misinterpreted the statute (App. 1a–5a). The district court granted summary judgment against petitioner, dismissing the complaint, and this judgment was affirmed on appeal (App. 7a–10a; Pet. 15–18).

ARGUMENT

Petitioner is concededly deportable as an alien crewman who overstayed his shore leave in December 1942. The only issue in the present case is whether he may qualify for the discretionary relief authorized by § 249 of the Immigration and Nationality Act, which permits the Attorney General to grant permanent residence status to certain longtime residents of the United States. Petitioner's application for such status was rejected on the ground that he did not meet the statutory prerequisites. That decision was clearly correct and is consistent with the decided cases to date.

1. To qualify under § 249, an alien must establish both (1) that he entered the United States before June 28, 1940, and (2) that he has had his residence in the United States *continuously* since such entry. The first of these requirements prevents petitioner from relying on his 1942 entry as a basis for relief under § 249.[3] The second requires him to trace *continuous* residence in the United States back to the first half of 1940.

[3] In answer to petitioner's contention that the decision in this case works a hardship upon him, it should be observed that in 1962 Congress considered and rejected an amendment whereby the cutoff date under § 249 would be changed to December 24, 1952. S. Rep. No. 2276, 87th Cong., 2d Sess., p. 3. When a substitute provision was enacted, alien crewmen were excluded from its scope. Cf. H. Rep. No. 2552, 87th Cong., 2d Sess., p. 4.

2. Petitioner concedes that an order of deportation was entered against him after his 1940 entry, and that he voluntarily executed that order by leaving the United States as a crewman on a Yugoslav vessel in 1942 (Pet. 3; App. 3a).[1] During the following two-and-a-half months petitioner was physically absent from the United States. Petitioner nonetheless contends that he remained a resident "in fact" of the United States because he was on board a merchant vessel. This argument cannot be squared with the plain meaning of "deportation" and is inconsistent with the statutory definition of "residence" as that word is used in § 249.

In essence, petitioner is contending that a deported alien can continue to be a resident of the United States. But if the act of deportation has any significance whatever, it must at least terminate the deported person's residency. Whether or not a deported alien takes up residence in another country, his compelled departure surely renders him a nonresident of the United States. The fact that he may subjectively harbor an intent to return to the United States illegally—or, as in this case, to re-enter legally and stay illegally—does not preserve the continuity of his residence.

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[1] The fact that petitioner left voluntarily rather than under compulsion is of no legal significance. Section 101(g) of the Immigration and Nationality Act, 8 U.S.C. 1101(g), provides:

"For the purposes of this Act any alien ordered deported (whether before or after the enactment of this Act) who has left the United States, shall be considered to have been deported in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed."

Moreover, "residence" is defined in § 101(a)(33) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(33), as follows:

> The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. * * *

Petitioner's "actual dwelling place in fact" for the two-and-a-half months after he had been ejected from the United States was the Yugoslav vessel. The court of appeals was reluctant to conclude that petitioner's "place of general abode" was a merchant ship sailing the high seas during a worldwide naval war. But it was petitioner's own choice to depart voluntarily aboard the Yugoslav vessel, rather than resist deportation, which determined his "dwelling place." In any event, his "actual dwelling place in fact" after his departure was assuredly not the United States.

3. Petitioner's argument that an alien can continue to have his residence in this country despite his expulsion pursuant to law has been rejected by the only judicial holdings which have considered the issue. *Sit Jay Sing* v. *Nice*, 182 F. Supp. 282 (N.D. Cal.), affirmed per curiam, 287 F. 2d 561 (C.A. 9); *Lum Chong* v. *Esperdy*, 191 F. Supp. 935 (S.D.N.Y.). See also *Cheung* v. *Hamilton*, 298 F. 2d 459 (C.A. 1). This contention also conflicts with the announced administrative application of the statute. *Matter of P* ———, 8 I. & N. Dec. 167 (1958).

The cases cited by petitioner are consistent with the result of this case. *Savorgnan* v. *United States*, 338

U.S. 491, held that a person who had lived in Italy for four years had established residence in that country for the purposes of the expatriation statute. *Rosenberg* v. *Fleuti*, 374 U.S. 449, ruled that an alien who resided lawfully in the United States did not make an entry, for the purposes of the immigration laws, when he returned to the United States after a visit of a few hours to an adjacent country. *Fleuti* manifestly did not purport to deal with the status of an alien who was expelled from this country after being here illegally.

4. Petitioner's residence status was not altered by the stipulation in the order of deportation granting him the privilege, under the so-called Ninth Proviso to Sec. 3 of the Immigration Act of 1917, 39 Stat. 874, of reentering temporarily in pursuit of his calling as a seaman. This stipulation was necessary because a deported alien could not return to the United States without advance permission. Act of March 4, 1929, 45 Stat. 1551.[4] The Ninth Proviso[5] merely authorized temporary entry, and in this instance it permitted petitioner to obtain shore-leave upon subsequent trips to the United States as a seaman. It did not authorize petitioner to retain or resume residence in the United States.

The decision below turned on statutory interpretation in an area of limited impact, and the reading it upheld is correct. It poses no problem of conflict-

[4] Now incorporated in Sec. 212(a)(17), Immigration and Nationality Act, 8 U.S.C. 1182(a)(17).

[5] Set forth in the opinion of the court below (Pet. App. 16) and substantially reenacted in Sec. 212(d)(3), Immigration and Nationality Act, 8 U.S.C. 1182(d)(3).

ing judicial decisions. We believe no tenable basis for further review by this Court has been suggested.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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